APPENDIX "A"

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

STATE OF TEXAS, ET AL.,	)(	
	)(	
V.	)(	Civil Action No.
	)(	A-73-CA-38
ROBERT W. FRI,	)(	
Acting Administrator of	)(	[Filed Oct. 2, 1973]
the United States	)(	
Environmental Protection	)(	
agency	)(	

MEMORANDUM OPINION AND ORDER

This is an action for declaratory judgment and mandamus to compel Defendant to allot the entire sum of money appropriated by Congress in the Federal Water Pollution Control Act Amendments of 1972, P.L. 92-500, 86 Stat. 816 (hereinafter the "Act"), to be spent for the construction of waste treatment plants for fiscal years 1973 and 1974. The State of Texas, which has been joined by the States of Oklahoma, Missouri, and Wisconsin, as intervenors, has brought this suit as a class action for all the States entitled to the allotment of said funds.

The facts, which are not in dispute, are as follows. On October 4, 1972 the Congress passed a water pollution control bill authorizing appropriation in the amount of $11,000,000,000. for the fiscal years 1973 and 1974. The

bill was vetoed on October 17, 1972 by the President, who stated that he found the bill to be inflationary. The Congress subsequently overrode that veto. On November 28, 1972 the Administrator of the Environmental Protection Agency (hereinafter E.P.A.) announced that pursuant to the President's directive he was allotting only $5 billion of the total $11 billion authorized. It is this "impoundment of funds" which is challenged in this suit.

The Court will deal first with the Defendant's motion to dismiss before proceeding to the merits. Defendant contends that this Court should dismiss this action because (1) Plaintiffs have failed to present a justiciable question; (2) this suit is essentially a suit against the sovereign and hence barred by sovereign immunity; and (3) this suit presents a political question which this Court cannot decide.

Defendant argues that since the complaint is barren of any allegation that any eligible applicant State has yet been turned down on any plan or project due to lack of funds, this suit is a hypothetical one and is not a case or controversy. This contention fails for three reasons.

First, the State of Texas has sworn through the affidavit of its Executive Director of the Texas Water Quality Board that the Board has approved and submitted plans to the E.P.A. 101 grant applications totalling $146,823,228. This amount exceeds the reduced total federal allotment of $55,388,000. made to the State of Texas in fiscal year 1973. Thirty-four of these applica-

tions have been turned down by the E.P.A. for lack of priority. At least sixty-three additional applications for federal aid are in the offing. It is thus clear that the State of Texas' interest in its reduced funding is more than hypothetical.

Secondly, it is clear from the legislative history that Congress was concerned with the ability of the grantees to effect long range plans in combating pollution. Indeed the planning problem was the reason for the implementation of the allotment procedure rather than the normal appropriation procedure in the Act. Congressman Harsha, the floor manager of the Act, observed during the debate on an amendment to substitute the normal appropriation procedure for the allotment procedure, "it is essential that the States, the interstate agencies and the cities have both the ability for and a basis for long range planning." 118 Cong. Rec. H2727 (Daily ed. March 29, 1972). It is clear that by the impounding of funds, the Administrator has placed a cloud over the long range planning ability of State and local governments.

Thirdly, Plaintiffs are injured because the funds authorized to be distributed to the States will be lost if not allotted at the appropriate time by the Administrator. In accordance with § 205(b)(1) only those funds properly allotted will remain available for obligation after the fiscal year for which they were appropriated.

The second ground for dismissal offered by the Defendant is sovereign immunity. A suit is said to be one

against the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the government from acting or to compel it to act. *Land v. Dollar,* 330 U.S. 731, 738 (1941). Defendant claims that a judgment in this suit would expend itself on the public treasury. This very contention was rejected in a case in which the Defendant raised the doctrine of sovereign immunity as a bar to the very claim sought to be litigated here. The court noted that the relief would not cause the *expenditure* of any unappropriated funds but only the *allotment* to the States of such funds. *New York City, et al. v. Ruckelshaus,* Civil No. 2466-72 (D.D.C. May 8, 1973). While these funds would become available for obligation, they would not thereby become obligated until Defendant approves a specific grant. Moreover, even if disbursement of the funds were sought, it is well established that such suits are not against the sovereign if there is a mandatory duty, which is alleged by the Plaintiffs in this case, to spend the funds. *Udall v. Wisconsin, Colorado, and Minnesota,* 306 F. 2d 790, 792 (D.C. Cir. 1962).

Defendant's third basis for dismissal is that Plaintiffs have called upon this Court to decide a "political question". Defendant paints the issue here with too broad a brush. The Court perceives the issue not to be the power of the executive in spending vis a vis the Congress but to be whether Congress intended that the funds in question must be allotted to the States or whether the Act

gives the Administrator discretion in allotting the funds to the States. The judicial branch has the function of requiring the executive branch to stay within the limits prescribed by the legislative branch. *National Automatic Laundry v. Shultz,* 443 F. 2d 689, 695 (D.C. Cir. 1971).

Now that it is established that this Court is not barred from considering this case, it is appropriate to proceed to the merits. The proper starting point is § 205 of the Act, which provides that:

> Sums authorized to be appropriated pursuant to section 207 for each fiscal year beginning after June 30, 1972, shall be allotted by the Administrator not later than the January 1st immediately preceding the beginning of the fiscal year for which authorized, except that the allotment for fiscal year 1973 shall be made not later than 30 days after the date of enactment of the Federal Water Pollution Act Amendments of 1972. Such sums shall be allotted among the States by the Administrator in accordance with regulations promulgated by him, in the ratio that the estimated cost of constructing all needed publicly owned treatment works in each State bears to the estimated cost of construction of all needed publicly owned treatment works in all the States.

Public Law 92-500, § 205(a).

It is significant to note that the word shall, which is used repeatedly, is normally mandatory in nature. *Boyden v. Commissioner of Patents,* 441 F.2d 1041 (D.C. Cir. 1971), *cert. denied,* 404 U.S. 842 (1971). Furthermore the procedure set up appears to give the Administrator no discretion in the actual allotting of funds. The

amount is established by a formula, and any amount allotted but not obligated must be reallotted in accordance with § 205(b)(1).

Defendant contends that allotment is discretionary on the basis of certain amendments made to §§ 205(a) and 207 of the Act. In § 205(a) the word "all" was deleted before "Sums authorized to be appropriated" and in § 207 the phrase "not to exceed" was inserted before the sums specified in the section. To evaluate these changes in the wording of the Act, it is appropriate to examine the views of the sponsors of the Act. See *Bank of Logan, Utah, v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966).

The Congressional Record reveals that the amendments to §§ 205(a) and 207 were proposed by Congressman Harsha, the floor manager of the bill, to point out that the Administrator was to have discretion regarding the obligation and expenditure of funds authorized under the Act. In explaining his amendments, Congressman Harsha said, "I want to point out that the elimination of the word 'all' before the word 'sums' in section 205 (a) and insertion of the phrase 'not to exceed' in section 207 was intended to emphasize the President's flexibility to control the rate of spending." 118 Cong. Rec. at H9122 (Daily ed. Oct. 4, 1972). Senator Muskie, the sponsor of the Act in the Senate, stated that the sole intent and purpose of the amendments was to give the Administrator some flexibility concerning the obligation of the sums specified in § 207.

118 Cong. Rec. at S1854 (Daily ed. Oct. 17, 1972). Senator Muskie emphasized the same point when he said that the full $18 billion authorized by the Act would probably not be spent until the end of fiscal year 1979. 118 Cong. Rec. at S18547 (Daily ed. Oct. 17, 1972).

The reason for the distinction between allotting and spending becomes evident when placed in context of the congressional concern over the problems of planning. As noted earlier Congress chose the allotment procedure and contract authority so that state and local governments would be able to effectively make long range plans in their fight against water pollution. The feeling was that without unequivocal federal financial commitment state and local governments would have difficulty entering into long term contracts and financing long term bonds. It is illogical to think that Congress would inject the same uncertainty back into the system it had sought to avoid with the allotment procedure by giving the Administrator discretion to choose the amount to be made available to the state and local governments. The logical interpretation seems to be that Congress intended to make a definite financial commitment to the state and local governments while at the same time giving the Administrator some discretion in the rate of spending to ease inflationary pressures.

In dealing with the language of a statute the Fifth Circuit has said, "We must look as well to the logic of

Congress and the broad national policy which was evidenced by its enactment." *Miller v. Amusement Enterprises, Inc.*, 394 F.2d 342, 353 (5th Cir. 1968). Evaluation of the Act as a whole and its legislative history evinces an unmistakable congressional intent to marshall the requisite federal funds to achieve the water quality goals set forth in the Act. The Congress made an exhaustive study of the problem and on the basis of those findings decided, in Senator Muskie's words, that:

> To achieve the deadlines we are talking about in this bill we are going to need the strongest kind of evidence of the Federal Government's commitment to pick up its share of the load. We cannot back down, with any credibility, from the kind of investment in waste treatment facilities that is called for by this bill, and the conferees are convinced that the level of investment authorized by this Act is the minimum dose of medicine that will solve the probems [sic] we face.

118 Cong. Rec. S16871 (Daily ed. Oct. 4, 1972).

Thus in light of the high priority placed by Congress on the Act, the language of the Act, and the legislative history of the Act, this Court concludes that the Administrator has a mandatory duty to allot to the Plaintiffs the sums authorized by Congress in § 207 of the Act in accordance with § 205(a). It is accordingly

ORDERED, ADJUDGED and DECREED that Defendant's motion to dismiss and for summary judgment are hereby DENIED, and that Plaintiffs' motions for summary judgment are GRANTED; it is further declared that Defendant's act in allotting $2 billion and

$3 billion for fiscal years 1973 and 1974, respectively, was unlawful under the Act and that Defendant is ordered to revise the allotments he has already made for fiscal years 1973 and 1974 to comply with § 205(a) and to make said allotments in the amount of $5 billion for fiscal year 1973 and $6 billion for fiscal year 1974.

Entered this 2nd day of October, 1973, at Austin, Texas.

/s/ Jack Roberts
UNITED STATES DISTRICT JUDGE

APPENDIX "B"

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

STATE OF TEXAS, ET AL	)(	
	)(	
V.	)(	Civil Action No.
	)(	A-73-CA-38
RUSSELL E. TRAIN, Administrator of the Environmental Protection Agency	)(	

JUDGMENT

This action came on for hearing before the Court, Honorable Jack Roberts, District Judge presiding, and the issues being duly heard and a decision having been duly rendered,

It is ORDERED, ADJUDGED and DECREED that:

(1) Defendant's motions to dismiss and for summary judgment are denied;

(2) Plaintiff State of Texas' motion for summary judgment is granted;

(3) Defendant's act in allotting $2 billion and $3 billion for fiscal years 1973 and 1974, respectively, was unlawful under the Federal Water Pollution Control Act Amendments of 1972, PL 92-500, 86 Stat. 816; and

(4) Defendant is ordered to revise the allotments he has made to plaintiffs so that the State of Texas is allotted its pro rata share of the $5 billion and $6 billion required to be allotted for fiscal years 1973 and 1974.

Entered this 25th day of October, 1973, at Austin, Texas.

DAN W. BENEDICT
CLERK OF COURT

by /s/ Wanda Peterson
Wanda V. Peterson, Deputy Clerk

APPENDIX "C"

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

STATE OF OKLAHOMA	)(	
	)(	
V.	)(	Civil Action No.
	)(	A-73-CA-38
RUSSELL E. TRAIN, Administrator of the Environmental Protection Agency	)(	

JUDGMENT

This action came on for hearing before the Court, Honorable Jack Roberts, District Judge presiding, and the issues being duly heard and a decision having been duly rendered,

It is ORDERED, ADJUDGED and DECREED that:

(1) Defendant's motions to dismiss and for summary judgment are denied;

(2) Plaintiff State of Oklahoma's motion for summary judgment is granted;

(3) Defendant's act in allotting $2 billion and $3 billion for fiscal years 1973 and 1974, respectively, was unlawful under the Federal Water Pollution Control Act Amendments of 1972, PL 92-500, 86 Stat. 816; and

(4) Defendant is ordered to revise the allotments he has made to plaintiff so that the State of Oklahoma is allotted its pro rata share of the $5 billion and $6 billion required to be allotted for fiscal years 1973 and 1974.

Entered this 29th day of October, 1973, at Austin, Texas.

DAN W. BENEDICT
CLERK OF COURT

by /s/ Wanda V. Peterson
Wanda V. Peterson, Deputy Clerk

APPENDIX "D"

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

STATE OF WISCONSIN	)(	
	)(	
V.	)(	Civil Action No.
	)(	A-73-CA-38
RUSSELL E. TRAIN,	)(	
Administrator of the	)(	
Environmental Protection	)(	
Agency	)(	

JUDGMENT

This action came on for hearing before the Court, Honorable Jack Roberts, District Judge presiding, and the issues being duly heard and a decision having been duly rendered,

It is ORDERED, ADJUDGED and DECREED that:

(1) Defendant's motion to dismiss and for summary judgment are denied;

(2) Plaintiff State of Wisconsin's motion for summary judgment is granted;

(3) Defendant's act in allotting $2 billion and $3 billion for fiscal years 1973 and 1974, respectively, was unlawful under the Federal Water Pollution Control Act Amendments of 1972, PL 92-500, 86 Stat. 816; and

(4) Defendant is ordered to revise the allotments he has made to plaintiff so that the State of Wisconsin is allotted its pro rata share of the $5 billion and $6 billion required to be allotted for fiscal years 1973 and 1974.

Entered this 29th day of October, 1973, at Austin, Texas.

DAN W. BENEDICT
CLERK OF COURT

by /s/ Wanda V. Peterson
Wanda V. Peterson, Deputy Clerk

APPENDIX "E"

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

STATE OF MISSOURI	)(	
	)(	
V.	)(	Civil Action No.
	)(	A-73-CA-38
RUSSELL E. TRAIN, Administrator of the Environmental Protection Agency	)(	

JUDGMENT

This action came on for hearing before the Court, Honorable Jack Roberts, District Judge presiding, and the issues being duly heard and a decision having been duly rendered,

It is ORDERED, ADJUDGED and DECREED that:

(1) Defendant's motions to dismiss and for summary judgment are denied;

(2) Plaintiff State of Missouri's motion for summary judgment is granted;

(3) Defendant's act in allotting $2 billion and $3 billion for fiscal years 1973 and 1974, respectively, was unlawful under the Federal Water Pollution Control Act Amendments of 1972, PL 92-500, 86 Stat. 816; and

(4) Defendant is ordered to revise the allotments he has made to plaintiff so that the State of Missouri is allotted its pro rata share of the $5 billion and $6 billion required to be allotted for fiscal years 1973 and 1974.

Entered this 29th day of October, 1973, at Austin, Texas.

DAN W. BENEDICT
CLERK OF COURT

by /s/ Wanda V. Peterson
Wanda V. Peterson, Deputy Clerk

APPENDIX "F"

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

STATE OF TEXAS, ET AL	)(	
	)(	
V.	)(	Civil Action No.
	)(	A-73-CA-38
RUSSELL E. TRAIN,	)(	
Administrator of the	)(	
Environmental Protection	)(	
Agency	)(	

JUDGMENT

This action came on for hearing before the Court, Honorable Jack Roberts, District Judge, presiding, and the issues being duly heard and a decision having been duly rendered.

It is ORDERED, ADJUDGED and DECREED that:

(1) Plaintiff State of Kansas' motion for summary judgment is GRANTED;

(2) Defendant's acts in allotting $2 billion and $3 billion for fiscal years 1973 and 1974, respectively, were unlawful under the Federal Water Pollution Control Act Amendments of 1972, PL 92-500, 86 Stat. 816; and

(3) Defendant is ordered to revise the allotments he has already made for fiscal years 1973 and 1974 to the State of Kansas so that it is alloted its pro rata

share of the $5 billion and $6 billion required to be allotted for fiscal years 1973 and 1974 by the Act.

Entered this 6th day of December, 1973, at Austin, Texas.

DAN W. BENEDICT
CLERK

by /s/ Wanda V. Peterson
Wanda V. Peterson, Deputy Clerk

APPENDIX "G"

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 73-3965
No. 73-4026

STATE OF TEXAS, ET AL.,

Plaintiffs-Appellees,

v.

RUSSELL E. TRAIN, Administrator of the Environmental Protection Agency,

Defendant-Appellant.

* * * * * * * * *

STATE OF TEXAS, ET AL.,

Plaintiffs-Appellees,

v.

RUSSELL E. TRAIN, Administrator of the Environmental Protection Agency,

Defendant-Appellant.

Appeals from the United States District Court
Western District of Texas

Before BELL, GOLDBERG, and CLARK, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellees' motion to expedite judgment on the merits in this matter is DENIED. *See Train v. City of New York* (No. 73-1377) and *Train v. Campaign Clean Water* (No. 73-1378), *cert. granted* April 29, 1974.

IT IS FURTHER ORDERED that the motion to vacate the stay order of this Court dated January 28, 1974 is GRANTED effective June 5, 1974.

APPENDIX "H"

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

EDWARD W. WADSWORTH
CLERK

600 CAMP STREET
NEW ORLEANS, LA. 70130

May 28, 1974

TO ALL COUNSEL OF RECORD:

No. 73-3965 - State of Texas, et al, v.
No. 73-4026 - Russell E. Train, Administrator of the Environmental Protection Agency.

[Argued & Submitted 4-29-74 - N.O. West Courtroom]

Gentlemen:

I am directed by the Court to advise that the disposition of the referenced cases is being withheld pending decision of the Supreme Court in the cases *Train v. City of New York,* (73-1377), *Train v. Campaign Clean Water* (73-1378), certiorari granted April 29, 1974.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By /s/ Richard E. Windhorst, Jr.
Richard E. Windhorst, Jr., Chief
Judicial Support Division

REW,Jr.:rcv

Messrs. Robert E. Kopp &
Eloise E. Davies
Mr. Theodore L. Priebe
Mr. Paul C. Duncan
Mr. Philip Maxwell
Mr. Curt Schneider